No. 304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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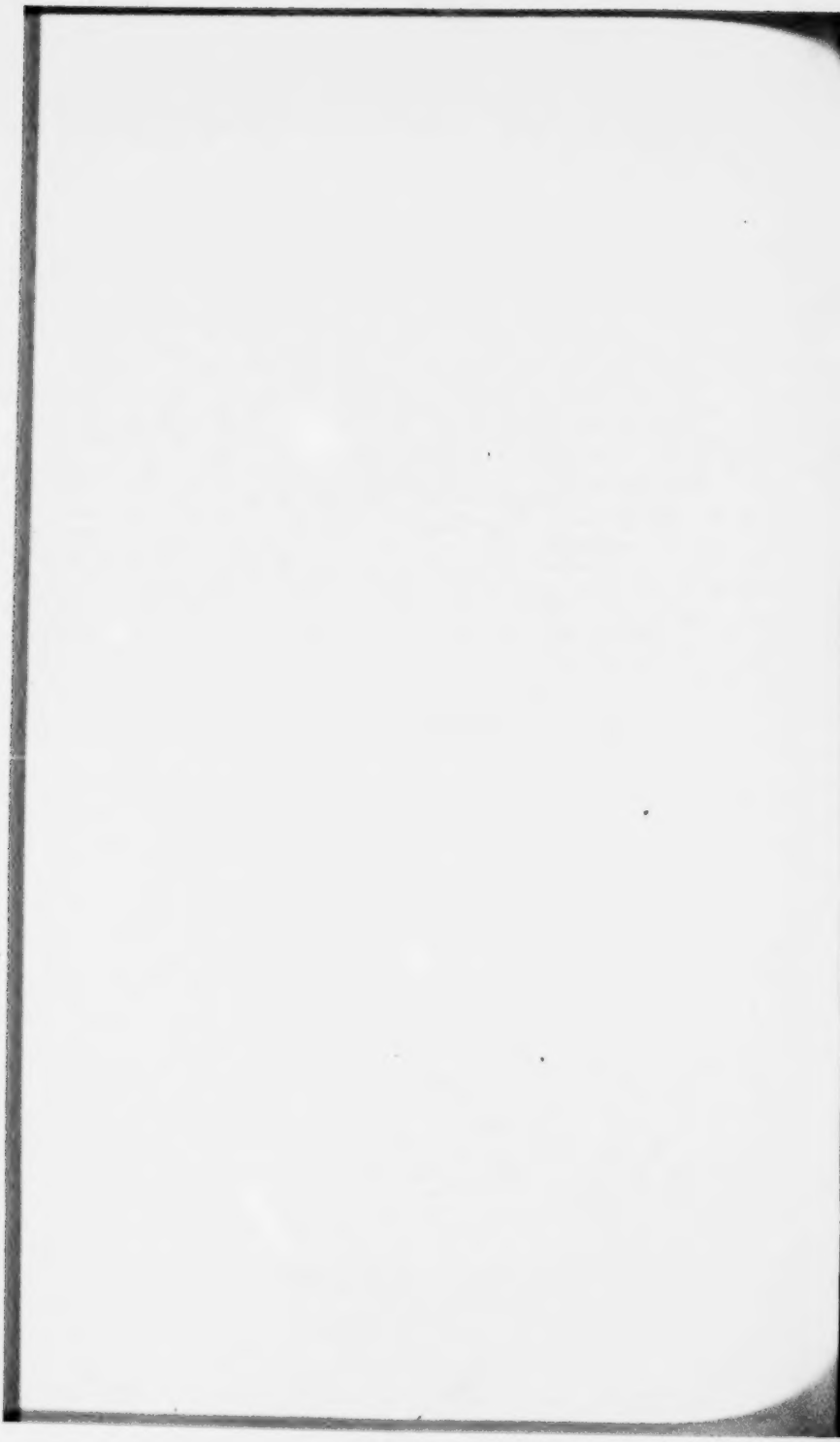

INDEX

CITATIONS

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Petitioner, Elmer F. Remmer, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the District of Nevada.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 3748, 3777) is reported in 205 F. 2d p. 277.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 3778). An order denying a petition for rehearing, rehearing en banc, and staying mandate was entered on June 30, 1953 (R. 3779). On July 17, 1953, an order was entered by Mr. Associate Justice Tom C. Clark of this Court, extending the time for filing a petition for writ of certiorari to and including August 29, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254.

QUESTIONS PRESENTED

1. Do mere errors in the taxpayer's books authorize the Commissioner to substitute another method of accounting?

2. Was the sufficiency of petitioner's accounting system a question for the jury?

3. Where all of the books and records are not in evidence, the court has denied petitioner's motion for discovery, and has quashed a subpoena requiring the Government to produce a mass of petitioner's original records, can a finding be made that petitioner did not keep adequate books which clearly reflect income, so as to permit a computation on the net-worth theory?

4. Where it is clear that a computation by the net-worth method has omitted an asset shown to have been in existence at the beginning of the indictment period, can any assumption be made that the difference between the net worth at the beginning of the year and the net worth at the end of the year represents taxable income received during the year?

(a) Without that assumption, does a net-worth computation establish a prima facie case of unreported income?

5. In computing income by the net-worth method, must the traditional basic distinction between the cash and accrual methods of accounting be observed or is the net-worth method independent of conventional accounting concepts?

6. May accounts receivable be included in a computation of net-worth on the cash basis?

7. Does the defendant have the burden of establishing the amount of a cash item which has been omitted from the Government's net-worth computation?

8. Are the tests for determining whether partnerships will be recognized for the purpose of computing civil lia-

bility, equally applicable to the determination of liability for criminal penalties?

(a) Are the tests used in civil cases so clear and certain that a defendant in a criminal case can properly be charged with knowledge in 1945 and 1946 of the development of the law in this field up to the year 1949?

9. Does Rule 16 of the Rules of Criminal Procedure, providing for a motion for discovery and inspection "at any time after the filing of the indictment", authorize the denial of the motion on the ground that it is not timely?

(a) If timeliness is an element, does the Rule permit the time to be charged against the defendant where the Government has contributed to the delay?

10. Does Rule 16 of the Rules of Criminal Procedure authorize the court to substitute its judgment for the defendant's and to deny inspection of records on the ground that the court disagrees with the defendant's appraisal of the expected benefits?

11. Does Rule 16 of the Rules of Criminal Procedure require a showing of the specific need for individual papers?

12. In a case where there is no suggestion that compliance with the subpoena would have hampered the Government in any way, does Rule 17 of the Rules of Criminal Procedure permit the quashing of a subpoena for production of documentary evidence on the ground that the motion was not timely, that the production would not be beneficial to the defendant, and that the defendant had failed to show the need for specific papers?

13. Where outside contact with the jury is alleged to have occurred during the trial, is the defendant entitled to a hearing to determine the facts, and to a new trial if warranted by the facts, or may the District Judge, who is

reported to have already made an investigation, unknown to petitioner, deny the motion without comment and make no official record of the occurrence?

STATUTES, RULES AND REGULATIONS INVOLVED

Internal Revenue Code:

> Sec. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.
> (26 U.S.C. 1946 ed., Sec. 41)
>
> Sec. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
> (26 U.S.C. 1946 ed., Sec. 145 (b).)

Sec. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and partner.* The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(26 U.S.C. 1946 ed., Sec. 3797)

Federal Rules of Criminal Procedure:

Rule 16. DISCOVERY AND INSPECTION.

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. SUBPOENA.

* * * * *

(c) *For production of documentary evidence and of objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or

oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

U. S. Treasury Department
Bureau of Internal Revenue
Regulations 111:

Sec. 29.42-2. Income Not Reduced to Possession.

Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

Sec. 29.3797-4. Partnerships.

The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law, but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. * * *

STATEMENT

Petitioner was convicted in the United States District Court for the District of Nevada, upon an indictment under Section 145 (b) of the Internal Revenue Code (26 USC 145 (b)), charging that petitioner willfully and knowingly attempted to defeat and evade income taxes for the years 1944 and 1945. The jury disagreed with respect to additional counts which involved the year 1946.

During the years 1944 and 1945, petitioner was in the gambling, cafe and food business (R. 1032, 1134, 1290). Petitioner and his wife filed separate returns. Each return showed the combined income and, on the community property basis, calculated a tax on one-half (R. 3519-3529). The returns of both petitioner and his wife disclosed income from the following enterprises (R. 3525, 3527-8):

San Diego Social Club and 21 Club
The 311 Club
The Menlo Club
110 Eddy Club
186 Day-Nite Club
186 Day-Nite Cigar Store

Corporate returns were filed for the 186 Club (Ex. 87-87A, R. 3541, 3551). (Ex. 88-88A, R. 3562, 3563). Partnership returns[1] were filed for the following enterprises:

21 Club (1944 return, R. 1077)
21 Club and San Diego Social Club (1945 return, R. 1076)
311 Club (1944 and 1945 returns, R. 1077)
110 Eddy (1944 return, Ex. 81, R. 3531)
110 Eddy (1945 return, Ex. 82, R. 3533)
186 Day-Nite Cigar Store (1944 return, Ex. 84, R. 3535)

[1] The return forms were designed for partnerships, syndicates, pools, joint ventures, etc. (R. 3530). They are commonly referrd to merely as partnership returns.

186 Day-Nite Cigar Store (1945 return, Ex. 85, R. 3538)
[2] Menlo Club (1945 return, Ex. 89, R. 3576)

Each return showed that petitioner had an interest.

A partnership return for the year 1944 was also filed by the B-R Smoke Shoppe (Ex. 78, R. 3530). It showed that petitioner had a one-half interest and that his share of the income was $600. The witness, Lando, who was shown on the return as a partner of the B-R Smoke Shoppe, testified that 1945 was a loss year (R. 1330). See also R. 1965, 1968.

On the premise that some of the partnership books were incomplete, the income of all of the partnerships was recomputed by the prosecution on the theory that increases in net worth represented taxable income. This assumed that the partnerships were the individual enterprises of the petitioner, which was the principal issue in the case. If the partnerships were recognized and petitioner's individual books were adequate, the use of the net-worth method in a prosecution of petitioner as an individual would have raised other questions. A revenue agent testified that the 21 Club had a fairly complete set of records, consisting of a general ledger, journal, and cash receipts and disbursements (R. 1250). Witness Semenza testified as to the condition of the books (R. 3275, 3281, 3283-5, 3287, 3289, 3290, 3299, 3413, 3415, 3417, 3418) and concluded that they were adequate (R. 3432).

Although the prosecution's own case included uncontradicted evidence that varying amounts of cash were held in safes and deposit boxes throughout the years involved (R. 1268, 1484, 1535, 1536), the prosecution exhibit used in computing petitioner's net worth at the beginning of 1944, 1945 and 1946 showed no figures for cash outside the banks (Ex. 183, R. 3613). Witness Semenza testified that without that cash figure it was impossible to determine correct net worth (R. 3292-3). Two government witnesses reluc-

[2] The Menlo Club did not begin operation until 1945.

tantly agreed (R. 2557-8, 2878-80). Government counsel instructed the accountant with respect to treatment of various items (R. 2870-78-81-85).

The prosecution computed the net worth of each partnership separately. For present purposes the Court is concerned only with the following four partnership enterprises:[3]

110 Eddy Street (Ex. 163, R. 3589)
Day-Nite Cigar Store (Ex. 164, R. 3593)
Menlo Club (Ex. 165, R. 3597)
B-R Smoke Shoppe (Ex. 169, R. 3601)

These computations were based on the petitioner's books and records and were merely a restatement of the results of the operations in a different accounting form. Some changes involved the capitalization of improvements instead of treating them as expenses (R. 1268, Ex. 165, 174), and the treatment of taxes as additions to costs instead of as expense items, Ex. 175. The prosecution did not rely on the discovery of any specific item of new income or any new source of income beyond those reported in the books or tax returns.

After calculating the net worth figures of the partnerships separately the figures were transferred to a composite exhibit showing the net worth computation for the petitioner and his wife (Ex. 183, R. 3612). This exhibit reflected the theory of the prosecution that all of the income of the enterprises should be allocated to petitioner. This was done upon instructions of the prosecuting attorney (R. 28.70) not of the accountant.

The amounts of partnership net worth, all of which was charged to petitioner in Ex. 183, are as follows:

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[3] The 186 Club was treated by the prosecution as a corporation and therefore no net worth figure representing its income was included in Ex. 183. The 186 Club occupied the back room of Day-Nite Cigar Store (R. 1425). It was bought in 1943 by Nealis and Kopstick (R. 1425), who later withdrew and were paid off (R. 1427). The prosecution recognized the partnership status of the 21 Club and San Diego Social Club (R. 2894). In Tax Court proceedings all enterprises are recognized as partnerships. *Remmer* v. *Commissioner*, Docket No. 23486.

	1944	*1945*
B-R Smoke Shoppe	$18,231.47	$23,344.66
Day-Nite Cigar Store	39,494.37	30,390.47
110 Eddy Club	39,998.52	44,321.40
Menlo Club		183,647.94
Total	$97,724.36	$281,704.47

In this manner the prosecution arrived at the conclusion that petitioner had understated his income as follows (Ex. 183, R. 3613):

	1944	*1945*
Total Income per Exhibit 183	$50,747.91	$71,065.40
Income Reported	19,000.00	59,318.36
Difference	31,474.91	11,747.04

The relationships between petitioner and his partners were evidenced by oral and written agreements. Prosecution witness, Kyne, had an interest in six different enterprises (R. 1493, 1496) including the four which are of present importance here. A written agreement between Kyne and petitioner concerning the Menlo Club was introduced as Government Exhibit 113, R. 3582. A similar written agreement was made with witness Maundrell (Ex. 130, R. 3585) and other partners. There was also a written agreement concerning the Transit Smoke Shoppe, a later enterprise (R. 1189, 1523). Kyne testified that the oral agreements were similar in nature.

The written agreements deal with two different kinds of interest: An immediate "working interest" in the profits (R. 338) and an "actual interest" in the assets to be acquired by credits of undrawn profits (R. 1509). Because petitioner financed the enterprises, the arrangement contemplated that the shares of the profits of the other partners would be credited to their capital accounts until such time as the accumulated credits equalled their shares of the original investment and that petitioner's capital would be withdrawn in the same proportion as the other part-

ners' earned credits. Witness Semenza, an accountant, testified that this is the usual practice in partnerships of a similar nature (R. 3388, 3423, 3433). With respect to the Menlo Club, for example, the equities of the various partners were credited with their working interests and charged with their withdrawals (R. 1807-8). Maundrell withdrew from the enterprise in 1948 and received all but $1700.00 of his equity in cash (R. 1807-10). Other partners drew on their accounts from time to time (R. 1833-5). The tax returns showed the distributive share of each partner and defendant's Ex. M-1 contained summaries of the partners' accounts (R. 3632, 3637, 3642). No ledger accounts were set up for the B-R Smoke Shoppe; the profits were divided between the partners at the end of each year. The other enterprises maintained regular books, with complete and detailed records of receipts and disbursements on a daily basis. The ledger posting was not up-to-date, but could readily be made current from the original records (R. 3275).

Petitioner spent little time around any of the enterprises (R. 1494). The other partners were active in the business (R. 1323, 1494). Cavani and Turner ran the 110 Eddy Club; Lando ran the B-R Smoke Shoppe; Maundrell was office manager for the Menlo Club, card room, bar, and restaurant (and also supervised the Day-Nite Cigar Store in Kyne's absence). Nelso, Ditto, Fricker, and Turner, who were also partners in the Menlo Club, had supervision of the various shifts in the 24-hour operation conducted there (R. 1330, 1385).

Petitioner did not participate in keeping the books (R. 1494-5). Public accountants were employed for that purpose. Lando was well known in the sporting and racing fraternity and his contribution to the partnership was his knowledge of the game and his ability to make prices (R. 1322-3). Kyne's working interest in the 110 Eddy Club was for services (R. 1382). He was the real manager of all of the enterprises (R. 1494).

With respect to the partnership issue, the instructions to the jury were as follows:

Instruction No. 24, R. 142:

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. Partnerships as such are not subject to income tax, but are required to make returns of income.

A partner in a partnership shall include in his individual net income his share of the net income or loss of the partnership. If he draws either more or less than his share, his income tax is nevertheless based on the share to which he is entitled under the partnership agreement.

Instruction No. 28, R. 143, 144:

Certain businesses were described in the income tax returns in evidence as partnerships. The law does not prescribe any specific form of agreement as a requisite for partnership status. A partnership is an organization of two or more parties who have intended in good faith, and acting with a business purpose to join together in the present conduct of an enterprise. The arrangement between them may be either written or oral, and can be either an express or an implied agreement. It is not necessary that they contribute equal amounts of capital, or devote equal amounts of time to the business of the partnership, or have an equal share in the drawings, or have an equal right to draw money out of the business. The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners.

Petitioner's request for instructions dealing specifically with the "working interest" was denied (R. 83-4).

Proceedings Under Rules 16 and 17 of the Rules of Criminal Procedure.

The criminal indictment was filed on April 9, 1951 (R. 8). The case was set for trial on November 28, 1951 (R. 36). A motion for a bill of particulars was filed April 27, 1951, and denied June 15, 1951 (R. 1[illegible]).

On November 13, 1951, petitioner filed a motion for a continuance (R. 16-17), and on November 14, 1951, a motion seeking a court order to inspect and take copies of certain books and records pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure. The records sought were described as "The books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of" several named enterprises and any others from which the Government contends petitioner received income as an owner during the years 1944, 1945 and 1946. Supporting affidavits were filed with the motions (R. 20-34). They recited that the Government had placed liens against petitioner's funds; that a certified public accountant who had assisted the petitioner prior to the indictment had withdrawn because of petitioner's inability to compensate him for his services (R. 49); that petitioner's tax counsel had become associated with the case in March, 1951; that in September, 1951, a certified public accountant had finally been engaged; that access to the records had been denied by the Government after the indictment, and that the records covered by the motion were material to the preparation of the defense.

The Government filed an affidavit in opposition (R. 35-41). This affidavit recited that certain records had been procured by the Government from third parties. (At the trial the third parties were identified as certain other partners in the enterprises (R. 2122-2126)). The affidavit in opposition to the motion also recited that prior to the indictment certain of the records had been turned over to an accountant for his use in behalf of the petitioner; that the

accountant had turned them over to one of the petitioner's attorneys who continued to hold them and that the accountant had been unable to return them to the Government in accordance with his agreement. These latter records were subsequently deposited with the Clerk of the Court, pursuant to an order of the Trial Judge, and made available to both parties during the trial (R. 928-929, 1151). Petitioner's motion covered a considerable quantity of original records such as adding machine tapes, bank statements, cancelled checks, dealers' daily reports, etc. (R. 48). These were never made available to petitioner during the trial (R. 2717, 2771, 3250), although they were actually in the court house (R. 2451, 3483-6).

Both of petitioner's motions were denied (R. 42, 3492). The Court of Appeals held that prior opportunities which had been afforded petitioner's representatives to examine the material were sufficient (R. 3755), that the motion to inspect and take copies was not timely (R. 3756), and that no specific showing of prejudice had been made (R. 3758).

Pursuant to Rule 17 of the Federal Rules of Criminal Procedure, petitioner filed a motion on November 23, 1951, together with supporting affidavits filed November 26, 1951, and procured a subpoena (R. 46-7) for production and inspection of books, papers, documents and objects (R. 42-54). The prosecution filed a motion to quash the subpoena, based upon the earlier affidavit (R. 55-58). The petitioner's motion was denied and the motion of the prosecution was granted (R. 58). The Court of Appeals sanctioned the denial of petitioner's motion because of the circumstances discussed in connection with the motions under Rule 16 (R. 3757). The Court of Appeals did not hold that compliance with the subpoena would have hampered the Government in any way.

Improper Communication With Jury

The verdict of the jury was returned on February 22, 1952 (R. 88). On February 24, 1952, certain stories ap-

peared in California newspapers to the effect that during the trial the District Judge had enlisted the aid of the Federal Bureau of Investigation to investigate a remark made to one of the jurors at his home to the effect that money might be paid to the juror if he supported the defense (R. 114, 117). The defense had no prior knowledge of the incident (R. 112). A motion for new trial was filed on February 29, 1952 (R. 106) which included as Ground 17 (R. 109) the contention that the defendant had been substantially prejudiced and deprived of a fair trial by the incident. In addition, petitioner moved that there be a trial of the issue and that evidence be produced to adduce what had actually transpired. In support of Ground 17, an affidavit by petitioner's counsel was filed (R. 111) to which copies of the newspaper stories were attached. The affidavit alleged that the petitioner had been prejudiced by the incident and that the interests of justice required a trial of the issue (R. 112). The facts alleged in the affidavit were not challenged by opposing affidavits or by any remarks of the Trial Judge or the prosecuting attorneys. No hearing was held and no findings were made. The motion for new trial and the motion for a hearing for the purpose of developing the facts were denied without any comment (R. 93-94).

Treatment of Accounts Receivable as Cash

The evidence with respect to petitioner's taxable income on the net worth theory was summarized in prosecution Ex. 183 (R. 3612). Item 2 of that exhibit dealt with the B-R Smoke Shoppe and brought into the computation the results shown by Ex. 169 (R. 3601). The latter showed bank roll, cash on hand, at the end of 1945 to be $20,000. Exhibit 169 indicates that it was based on the testimony of Pritchett, a prosecution witness, and on Ex. 111-A. Pritchett testified (R. 1949) that the "cash" consisted of $15,000 of "markers" and only $5,000 in actual cash. The term "markers" was identified as meaning IOU's or Ac-

counts Receivable which had not been paid (R. 1962, 1968). Pritchett's testimony dealt with the "markers" of customers and represented bets which had not been paid and which affected the business profits (R. 1965-1969). "Markers" representing the indebtedness of partners were considered as cash on settlements between the partners (R. 1734). Defendant's Exhibit M-1 omits the markers and shows cash on hand as $5,000 (R. 3628-9).

The only bank roll figure shown in Ex. 111-A was the amount as of January 1, 1943 (R. 2773). Exhibit 169 assumed, without any evidence to support it, that the bank roll remained the same at the end of 1943 and at the end of 1944 (R. 2773). Government witness Weaver testified that the result of his treatment of the markers was to increase the net worth of the business by $15,000 (R. 2781). He thought the markers represented cash advances, despite Pritchett's testimony (R. 2780). The Court of Appeals understood that the markers represented unpaid bets but held that they were properly treated as cash because of its belief that they were collectible (R. 3769).

Weaver further testified that in preparing the net worth computation for the Menlo Club he had used "mostly" the cash receipts and disbursements method and that it was impossible to secure an accurate picture "by sticking to any one particular method specifically" (R. 2621). At another point Weaver testified that "there has actually arisen a sort of hybrid basis" (R. 2727).

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In holding that the tests for determining the recognition of a partnership for Federal income tax purposes as set forth in *Commissioner* v. *Culbertson*, 377 U.S. 733, are applicable in a criminal case, and that a failure to report all of the partnership income in his individual return is evidence of the defendant's willful intent to evade income taxes.

2. In not holding that the method of accounting employed by petitioner is capable of clearly reflecting the income; or in not holding that the applicable method of accounting must be determined by the Commissioner of Internal Revenue.

3. In holding that the petitioner failed to keep adequate records which would clearly reflect income and that the net-worth method of proof was therefore permissible.

4. In holding that, despite the omission from a net worth computation of a cash item which was known to exist at the beginning of the indictment period, the case could be submitted to the jury on the assumption that the difference between the opening net worth and the closing net worth represented taxable income received during the year.

5. In holding that the defendant had the burden of establishing the amount of the omitted cash item.

6. In holding that the Government's net worth computation for a taxpayer on the cash basis properly includes accounts receivable.

7. In sanctioning the denial of petitioner's motions under Rules 16 and 17 of the Rules of Criminal Procedure.

8. In sanctioning the denial of petitioner's motion for a hearing to determine the facts of a reported incident during the trial involving one of the jurors and a third person.

9. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. Conflicts of Decision with Respect to the Necessity for Establishing the Net Worth at the Beginning of the Indictment Period.

The decision of the Court of Appeals is in conflict with the decisions in two other Circuits, viz: *Bryan* v. *United States*, 175 F. 2d 223 (CA 5) affirmed without considering point in issue here, 338 U.S. 552, and *United States* v. *Fenwick*, 177 F. 2d 488 (CA 7). Those cases hold that

where the prosecution attempts to establish an understatement of income by the net-worth method, the case should not be submitted to the jury if the starting point net worth is not definitely established, because the evidence is not sufficient to make out a prima facie case. In civil fraud cases the Tax Court similarly requires a definite establishment of the net worth at the beginning of the taxable period. *James Q. Whittemore* v. *Commissioner,* Tax Court Docket No. 13421, 7 T.C.M. 845, 849 (1948).

In criminal tax cases, several methods of proving unreported income are available to the Government. For example, it may show specific instances of failure to account for gross business income; it may show that deductions claimed on the tax returns were fictitious or false; it may show that false entries were made in the books or that a duplicate set of books was maintained for the purpose of concealing the true condition of the business. In the absence of direct evidence of this nature, unreported income may be shown, under certain conditions, by indirect evidence such as an analysis of bank deposits; by showing an increase in net worth; or by evidence of purchases, expenditures, and investments in excess of the reported income during the indictment years.

In this case, there is no evidence of any specific item of income which was not reported in the books or tax returns. The Government elected to prove its case exclusively by the net-worth method (R. 549-554), and it is bound by the limitations which have been established upon the use of it. In this method of proof, a showing is made that at the beginning of each year the defendant's assets were worth a specific sum and that at the end of the year his assets were worth a greater sum. The difference is then adjusted for any funds received as gifts, loans, inheritances, etc., for taxes paid, and for living expenses. The resulting figure is *assumed* to be taxable income. The Court of Appeals emphasized (R. 3764) the statement in *Bell* v. *United States,* 185 F. 2d 302 (CA 4) certiorari denied, 340 U.S. 930, that the net-worth method "by its very nature (it) is

an approximation." This should require all the more care in the use of the method, lest improper conclusions be drawn from it. Cf. *Thomas A. Talley* v. *Commissioner,* Docket Nos. 33140, 33141, 20 T.C. No. 101, June 30, 1953.

It is well settled that in a net worth case "the starting point must be based upon a solid foundation" (*United States* v. *Chapman,* 168 F. 2d 997, 1001 (CA 7)). No prima facie case is established unless it is clear that the net worth at the beginning of the indictment period accurately reflects the defendant's total assets. Infirmities in net-worth computations are matters for the court to determine, not the jury. (*United States* v. *Venuto,* 182 F. 2d 519, 523 (CA 3)). Accounting testimony in this record supports the necessity for an accurate starting figure (R. 1259, 3292-3). The reason is plain. New assets indicate the receipt of income; but assets are not really "new" if acquired with cash on hand at the beginning of the year, or in exchange for other assets. Accordingly, where the starting point net worth is not established, the source of apparently new assets is in doubt, and the assumption that the difference in net worth represents income, may not be made. Without that assumption, the net-worth computation is meaningless because no reasonable mind could conclude that it was evidence of the receipt of income in the taxable year.

The prosecution introduced in evidence a computation of net worth made by a Revenue agent (Ex. 183, R. 3612). Line 25 is marked "Cash in Safe Deposit Boxes" but no figures are shown which affect the computation. Instead of figures, the column listing the assets for each year shows an interrogation mark. The exhibit was prepared in that manner on instructions from Government counsel (R. 2878). The prosecution showed by its own witness that the petitioner held cash in safes and deposit boxes at all times (R. 1268, 1484, 1535, 1536, 2956). There was no evidence to the contrary but neither was there any evidence as to the exact amount of the cash on December 31, 1943. There was evidence that a check in the amount of $17,739.50 was

cashed on December 3, 1943, and the proceeds placed in a safe deposit box (R. 1483-4); that the cash in the box varied every day and that there were, in addition, two safes where money was kept. A third safe, mentioned in the evidence, affects an enterprise which came into existence during the year 1945.

Petitioner objected to the introduction of Ex. 183 (R. 515-538, 2856-2857) and moved for a judgment of acquittal on the ground that the use of the net-worth method was not available to the prosecution because of lack of evidence as to the starting point (R. 3477). The instructions to the jury on the point were inadequate (R. 136-138) and the petitioner's request for other instructions was denied (R. 79-83).

On a review of this evidence, together with evidence that petitioner did not pay a 1938 judgment of $1800 until 1945, the Court of Appeals sanctioned the use of the net-worth method in this case and declined to follow the decisions in the *Bryan* and *Fenwick* cases (R. 3766). The District Judge expressed the opinion that those cases are ridiculous (R. 2969). It is apparent that both courts below missed the significance of the starting figure (R. 2880-1, 2964).

The Court of Appeals expressed the view (R. 3765) that the Government would be frustrated in its attempt to enforce the tax evasion provisions of the Internal Revenue Code if net-worth cases were withdrawn from juries because of mere statements that defendants had additional undisclosed assets (R. 3765). However, that is not the situation here because the existence of cash in some unknown amount was not open to question. The testimony regarding the existence of the cash was produced by a prosecution witness (R. 1483-4); there was no evidence to the contrary and there is thus virtual agreement that a cash asset in some amount existed. Line 25 of Ex. 183 shows Government recognition of the existence of the asset. The suggestion of the Court of Appeals that the unpaid $1800 judgment outstanding on the critical date tended to

show that petitioner did not have any substantial amount of cash overlooks the cash in bank shown by Ex. 163 (R. 3589) and Ex. 169 (R. 3601) in the amount of $8,425.51 as of December 31, 1943.

Moreover, this reluctance of the Court of Appeals to require the Government to prove its case undermines the principle that the Government has the burden of proof and it shifts to defendants the obligation to show the amount of starting-point cash. The Internal Revenue Code does not require taxpayers to keep records on a net-worth basis and they are ordinarily no better prepared than the Government to produce evidence of their cash position after a lapse of several years. Here there can be no doubt that petitioner habitually kept considerable amounts of cash outside of the banks. That is not speculation; it was established as a part of the Government's case. The practice of holding considerable cash outside of banks was not unusual in the light of the nature of the enterprises. We submit that petitioner is entitled to be tried and judged under the traditional principles generally applicable in courts of criminal justice and that, since the Government did not make a prima facie showing, it was not entitled to submit the case to the jury.

It is quite evident that there is a lack of understanding in the courts of the fundamentals underlying the net-worth method of showing receipts of taxable income in specified years and that the guidance of this Court is required to secure uniformity.

2. Commissioner's Authority to Depart from Taxpayer's Method of Accounting.

In approving the Government's use of the net-worth method for all of petitioner's enterprises, the Court of Appeals has decided a frequently-recurring question of federal tax law and has reached a result which probably conflicts with an applicable decision of this Court. The Court of Appeals has misconstrued the term "method of

accounting" and has permitted departure from the taxpayer's method upon a showing which this Court held to be insufficient in an analogous situation (R. 3762). Except for the B-R Smoke Shoppe, the evidence of inadequacies in petitioner's books amounted to no more than normal accounting errors (R. 2630-88, 2755, 2772). Section 41, Internal Revenue Code, permits taxpayers to select any method of accounting which properly reflects their income. The Commissioner's authority to select a different method is limited to situations where (1) no method of accounting has been regularly employed, or (2) the method employed does not clearly reflect the income. This does not mean that the Commissioner is free to disregard the "method" merely because the books contain errors. *Thomas A. Talley* v. *Commissioner,* Tax Court Docket Nos. 33140, 33141, June 30, 1953, 20 T.C.—No. 101. Inaccuracies and delayed posting from original records are not uncommon occurrences, but they do not condemn the "method" and permit the Commissioner to select another.

This was the authoritative interpretation of an earlier tax statute. The Revenue Act of 1916 permitted returns on the taxpayer's "basis of keeping accounts" and this Court held that the quoted language "refers to the general bookkeeping system followed by the taxpayer and not to the accuracy or propriety of mere individual items or entries upon the books." *United States* v. *American Can Co.,* 280 U.S. 412. Accordingly, this Court held that where the Commissioner revalued inventories, disallowed an unauthorized mark-up, corrected the erroneous entries, and made reassessments in the amount of several million dollars, he did not reject the accrual basis upon which the returns were made, and that the cash basis could not be substituted.

Before taxpayers are subjected to criminal penalties based on the results of a method of accounting which they did not themselves employ and whose results they could not foresee, it would appear that if the courts are authorized

to deal with the question at all[4] they should require a showing that the basic methods actually employed were inherently inadequate and not capable of producing correct results. Here the Government produced no evidence of the use of an accounting method which was basically inadequate or calculated to deceive, and we submit that the Court of Appeals erred in approving a departure from the method of accounting employed by the petitioner.

Moreover there was no sufficient showing that the petitioner's books and records were inadequate in the sense that they were incomplete or inaccurate. This necessarily follows because all of the books and records were not in evidence. A large quantity of petitioner's original records was in the possession of the Government, they were not introduced in evidence, and petitioner's attempts to reach them through a motion for discovery and a subpoena for production were unavailing. *See Infra,* pages 31-33.

The net-worth method is frequently employed by the Government in civil and criminal fraud cases (*Montgomery* v. *United States,* 203 F. 2d 887, 892 (CA 5)). Admittedly, it gives only an approximate result (R. 3764) and this Court should review the Government's policy in order to correct an apparent disregard of basic principles.

3. Relationship of Net-Worth Method to Basic Cash and Accrual Methods.

This Court has not previously considered the question whether the net-worth method of proving income is a permissible hybrid method of accounting. The Court of Appeals has indicated that the basic distinction between the cash and accrual methods of reflecting income is not applicable. With respect to the markers which represented accounts receivable (R. 1962, 1968), the Court of Appeals

[4] Section 41, I.R.C., provides that the Commissioner shall make the determination. He has determined deficiencies without departing from the method of accounting adopted by petitioner's enterprises. Tax Court Docket 23486

held that they were properly included as part of the assets of a business accounting on the cash basis, regardless of whether they should technically be treated as cash or accounts receivable (R. 3769). The Government's brief in the court below made the same statement (fn. 16, p. 68). Unless the net-worth method is an exception, this is a departure from the well-settled rule that income may be computed on either a cash or an accrual method, but not on a hybrid system. In *Security Flour Mills Company* v. *Commissioner*, 321 U.S. 281, this Court said: "We are of the opinion that the purpose of the language which Congress used [Secs. 41, 43, Revenue Act of 1943] was not to substitute, whenever in the discretion of an administrative officer or tribunal such a course would seem proper, a divided and inconsistent method of accounting not properly to be denominated either a cash or an accrual system."

Either the Court of Appeals recognized the net-worth method as a hybrid system or it has decided a Federal question in conflict with applicable decisions of this Court. The statement in the Government's brief below supports the first alternative. In either event, the supervisory authority of this Court should be exercised.

Accounts receivable are definitely accrual items. They may properly represent income only where the accrual method of accounting is employed. The net-worth method was employed here by the Government on the theory that the annual difference would represent income to a taxpayer on the cash basis. Accordingly, any asset which did not represent the investment of cash should have been omitted. Accounts receivable may not properly be regarded as income on the cash basis and their inclusion in Exhibit 183 was definitely prejudicial to the petitioner.

While Exhibit 183 (R. 3612) was a statement of assets, it was not a statement of asset values (R. 551) because the annual difference between asset values does not represent taxable income on any basis. With respect to items other than cash, it reflected cash outlays which had been made to

procure or improve the assets on hand at the end of the year (R. 2555). See, for example, the item in Ex. 169, R. 3601, "Cost of Business Purchased from Sherwood." The markers are reflected in Item 2 of Ex. 183 as a portion of the assets computed for the B-R Smoke Shoppe on Ex. 169. Exhibit 169 shows an asset of cash on hand, of $20,000, which is identified as supported by Ex. 111-A, and by the testimony of prosecution witness Pritchett. The latter testified (R. 1949, 1962, 1968) that the cash on hand was $5,000 and that the other $15,000 was in markers which represented unpaid bets. Thus, it is clear that the markers were not assets which had been purchased by the expenditure of cash; instead, they represented the amount of credit which had been extended to customers; they were mere promises to pay, not cash. When markers were paid the cash on hand was increased (R. 1360). The markers differ from the loans shown in Ex. 183 (e.g. Item 13). While the latter represents promises to pay, they were not included in the Exhibit for that reason; rather they were included because they represented investments of cash during the year. The witness who prepared Ex. 183 testified that he included the markers at the direction of one of the prosecution attorneys (R. 2878).

This question vitally affects the year 1945. For that year the prosecution contended that petitioner understated income in the amount of the difference between the total income as shown by Ex. 183 and the amount of income reported. This difference was said to be $11,747.04 (R. 3613). Accordingly, it is clear that if the $15,000 represented by markers were eliminated from the computation, there would be no difference (understatement of income) whatever for the year 1945.

The net-worth method is frequently used by the Government in criminal tax cases. In *United States* v. *Johnson*, 319 U.S. 503, this Court approved of the use of such a method as "reinforcement" to evidence of unreported income from a specific source. Here, and in other cases, the

net-worth method is the sole proof. It is important in the administration of criminal justice that this Court consider and settle the question whether the net-worth method (which is never used in income tax returns) is a permitted hybrid method, or whether, in employing it, the Government must adhere to the conventional cash and accrual systems.

4. Tests for Determining Liability for Criminal Penalties Where Government Disagrees with Taxpayer's Interpretation of Technical Statutory Provisions.

This case presents a question of far-reaching importance which has not heretofore been considered by this Court and which requires an authoritative answer It affects all of the technical questions of tax law which are embodied in the Internal Revenue Code and will determine whether laymen can be subjected to criminal penalties on the presumption that they have a clear and certain undertsanding of the law.

As shown by the statement of facts, petitioner's returns disclosed the receipt of income from various enterprises, and those enterprises filed partnership returns, disclosing that petitioner was liable for his share of the income. The Government contended that four of the partnerships should not be recognized for tax purposes and that petitioner was therefore liable to criminal penalties because he had not reported all of the income individually. This was the paramount issue.

The prosecution recognized two of the six enterprises as partnerships (21 Club and San Diego Social Club) (R. 893-4) and the jury failed to convict on the counts dealing with the year 1946, for which partnership returns were also filed. The written partnership agreements were drawn in 1946 but related back. The 186 Club was eliminated from the partnership issue because the Government recognized it as a corporation. Notwithstanding the uncertain legal status of the enterprises, petitioner has been found guilty

of tax evasion on the presumption that he willfully and knowingly failed to report all of the income of the enterprises on his individual returns. The records of the Tax Court show that an official deficiency letter was issued on May 6, 1949, in which the 186 Club and all other enterprises were recognized as partnerships. *Remmer* v. *Commissioner,* Docket No 23486.

The Court of Appeals held (R. 3768) that the tests of liability for partnership income laid down in *Commissioner* v. *Culbertson,* 377 U.S. 733, 742, were applicable and that the question was one of fact for the jury. The *Culbertson* case was a civil case and this Court held that the question was one of fact for the Tax Court, the experts.

Fact-finding tribunals in tax cases are at liberty to look beyond the formal evidences of title, etc. *United States* v. *Cumberland Public Service Co.,* 338 U.S. 451, fn. 3. Permitting similar latitude to juries, and subjecting defendants to criminal penalties for reliance on formal documents, is a novel and dangerous extension of a policy adopted to give finality to the decisions of administrative agencies. Moreover, the *Culbertson* case was decided in 1949. Accordingly, it was not available to petitioner in 1945 and 1946, when he is alleged to have committed the offenses upon which he was convicted. But even if the tests applicable in civil cases are likewise to be applied in criminal cases, the tests are not sufficiently well understood that knowledge of the correct conclusion could safely be attributed to every layman.

The earlier cases in this field, *Commissioner* v. *Tower,* 327 U.S. 280, and *Lusthaus* v. *Commissioner,* 327 U.S. 293, were decided on February 21, 1946, about the time when the latest alleged offense of the petitioner occurred. These cases were rather widely misinterpreted by taxpayers and by the Courts (See *Trapp* v. *Jones* (W.D. Okla.) 87 Fed. Supp. 415; *Spies, et al,* v. *United States,* (N.D. Iowa), 84 Fed. Supp. 769). Even the Justices of this Court were not in agreement in the *Culbertson* case as to what tests should

be applied, nor as to the proper conclusion to be drawn in that particular case. The decision did not completely clarify the situation and the courts have been flooded with litigation ever since. The proceedings following this Court's remand of the *Culbertson* case are illuminating. Both courts attempted to apply the *Culbertson* decision, but they reached different conclusions. The Tax Court decision rendered on the remand, 9 T.C.M. 647, was reversed by the Court of Appeals, 194 F. 2d 581 (CA 5). It is not an overstatement to say that the tests for determining the civil liability are still uncertain and it is a new departure in the law to hold a taxpayer liable for criminal penalties when he mistakenly claims that his income should be computed on the partnership basis The partnership issue was not included in the criminal case, *Paysoff Tinkoff* v. *United States*, 86 F. 2d 866, (CA 7), nor were fraud penalties asserted in *Paysoff Tinkoff* v. *Commissioner*, 120 F. 2d 564 (CA 7), which this Court referred to as evidencing a claim by Tinkoff which carried the partnership theory to the *reductio ad absurdum: Culbertson* v. *Commissioner*, supra, fn. 8.

The Senate Finance Committee report on H.R. 4473, Proposed Revenue Act of 1951, discloses the then current confusion with respect to the recognition of partnerships for tax purposes. In 1952, the Bureau of Internal Revenue published a ruling outlining the Bureau's position with respect to recognition of partnerships for years prior to 1951 Mim. 6767, Cumulative Bulletin 1952-1, p. 111. A current ruling states that "the term 'partnerships' for tax purposes is broader than the term under common law, the Uniform Partnership Act, or individual State laws." Rev. Rul. 144, Internal Revenue Bulletin No. 16, Aug. 3, 1953, p. 29. The Bureau of Internal Revenue has attempted to require some partnerships to file corporate returns on the theory that they are associations. (*The Olmsted Hotel* v. *Commissioner*, Tax Court Docket 28375, 11 T.C.M. 694.) Recent decisions of the Tax Court illustrate that some

doubtful partnerships are still recognized. In *Frederick B. Hill, Jr.* v. *Commissioner*, Docket No. 32356, 12 T.C.M. 757, the Tax Court recognized a limited partnership for tax purposes. All but one of the partners were related. The partners bought their interests from Hill and paid for their interests with notes. With one exception, none of the other partners was required to devote any time to the business. There was a written partnership agreement, but it was not recorded. Taxpayers are faced with a hard choice if they are liable to criminal prosecution when they persist in their claim to the right to file partnership returns.

Today the tax liability for partnership income is one of the most prolific sources of litigation. A recent analysis of cases on the Tax Court docket for the period November 8, 1951 to January 19, 1953, shows over one thousand disputes in the partnership field (1953 Commerce Clearing House, Par. 8637). In such cases the question usually is whether the taxpayer is correct in his conclusion that he is liable for only a portion of the partnership income. This is a criminal case, but if it presents only the same question as the civil cases, any of the taxpayers in the thousand Tax Court cases would likewise be liable to criminal prosecution. If it be the law that the civil tests are applicable in criminal cases, any taxpayer who claims to be a partner may be indicted if the Bureau disagrees. If the Government really believes that the same tests apply, the dearth of reported criminal cases is difficult to explain.

However, we submit that the question in a criminal case is not the same as in a civil case. The offense of tax evasion requires, first, a knowledge that certain omitted income should be included in the tax return. The question here is whether petitioner knew that he had not created a partnership (or a syndicate, pool, joint venture, etc.), and knowingly misrepresented that he had. Where, as here, a taxpayer joins with others in the conduct of certain enterprises, his liability to include all of the income in his individual return is so uncertain that there is no basis on

which a jury could properly convict him of knowingly and willfully failing to report the entire partnership income with intent to defraud the revenue.

In a recent civil case where the Commissioner asserted fraud penalties because of his refusal to recognize the taxpayer's claimed partnership, the Tax Court agreed that the partnership should not be recognized for tax purposes, but it declined to approve the fraud penalties even though it held, on the authority of the *Culbertson* decision (P. 903), that "the parties did not in good faith intend to become partners for the operation of the business." (*C. C. Cooke* v. *Commissioner*, 10 T.C.M. 881). The Court of Appeals for the Tenth Circuit reversed the Tax Court and held that for some of the years involved the partnership should be recognized, 203 F. 2d 258. It did not disturb the Tax Court decision with respect to the fraud penalties and apparently the Commissioner did not file any appeal on that issue. The *Cooke* case is presently pending in this Court on a petition for certiorari, Docket No. 77, October Term, 1953.

In the case at bar, the jury was instructed (R. 144) that "The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners." In the *Cooke* case, supra, the Tax Court held that such a finding will not support even a civil fraud penalty. The jury was also instructed that the partnership must serve a business purpose (R. 143), and the Court of Appeals agreed that the applicable tests include that concept (R. 3678). We submit that the Court of Appeals has sanctioned an erroneous test and has mistakenly applied the civil rule in a criminal case. In a field where even the civil liability is so uncertain, it would appear that a taxpayer with any basis for claiming a partnership should be free to persist in his claims until overruled by the courts, without subjecting himself to criminal prosecution. When "dealing with criminal sanctions in the complicated, technical field of the revenue

law", *United States* v. *Carroll*, 345 U.S. 457, 460, there is no basis upon which a jury could properly find that a defendant had more knowledge in 1945 and 1946 than is possessed in 1953 by a multitude of taxpayers.

While the trial court covered the question of intent in a general charge (R. 134-5), the denial of petitioner's requested instructions Nos. 69, 75, 77, 78, 79, 80, 81, 82, 88, 89, and 90 (R. 73-79) left the jury free to determine the partnership issue by applying the civil rule.

A review of the case and of the policy of the Government in this field would be in the interest of taxpayers generally.

5. Practice Under Rules 16 and 17, Federal Rules of Criminal Procedure.

Matters of general importance are presented dealing with the practice under Rules 16 and 17 of the Federal Rules of Criminal Procedure, including the question whether the Court of Appeals has placed an unduly restrictive interpretation on them. The Court of Appeals has sanctioned the denial of petitioner's motion for a pre-trial inspection of his own records and has thus withheld from the petitioner the benefits of the "more liberal policy for the production, inspection, and use of the materials at the trial" which this Court has declared to be the purpose of Rules 16 and 17, *Bowman Dairy Company* v. *United States*, 341 U.S. 214, 218-220. Added significance is given to the denial of petitioner's motion by the circumstances which made the motion necessary and by the fact that an important issue in the case was whether petitioner's books and records were inadequate.

Despite the fact that Rule 16 authorizes a motion "at any time after the filing of the indictment", the Court of Appeals held that the motion was not timely. No weight was given to petitioner's unsuccessful attempts to secure the release from Federal lien of sufficient assets to finance his defense, (R. 22, 24), nor to the time consumed in unavailing efforts to arrange for inspection of the records without

a court order (R. 21-34, 166), during which the Government made unwarranted and impossible demands as the price of its consent (R. 29-30, 41). The significance of the Government's maneuvering apparently was lost on both courts below. The Government sought a net worth statement (R. 38, 50-54), and a showing of petitioner's "interest" in the enterprises (R. 27, 30, 33, 166, 185). It recognized petitioner's need for the records by bargaining with him for evidence which would bolster the Government's case, making its conditions one at a time, and having driven petitioner to a last-resort motion for a court order, the Government took the position that petitioner did not really need the records and secured a denial of the motion on the ground that the trial date was only two weeks away. The trial lasted three months, petitioner made repeated efforts to have access (R. 928-9), and the records sought were actually in the court house (R. 2451, 3483-6). Under all the circumstances, it would appear that the time element should have been given no consideration, even if the Rule itself did not foreclose it.

The Court of Appeals also referred to the prior opportunities which the defense had been given to examine the records. But they were in connection with the civil liability and occurred before the time when petitioner's tax counsel was engaged (R. 22, 32). It would be reasonable to anticipate that an examination of the records under his direction would develop additional defense material. The probability of benefit to be derived from the tax attorney's supervision of an examination of the records is especially marked here in the light of the Government's reliance on the net-worth method. This but emphasizes the lack of any rational basis for the opinion of the Court of Appeals that petitioner could not benefit from further examination of the records (R. 3755-6). It also raises the question of the extent to which the Court has discretion under the Rule to override the defendant's judgment in such a situation.

Since a prerequisite to the use by the Government of the net-worth method of proof is the lack of adequate business records of the defendant,[5] Sec. 41 I.R.C., (R. 3762), it seems plain that the suppression of a mass of original documents, of sufficient bulk to fill a packing box of approximately fifty cubic feet, plus several other smaller cartons (R. 48), was prejudicial to petitioner. Since the impressive quantity of records was in itself a matter of consequence, the rule was improperly interpreted by the Court of Appeals to require that the need for specific papers be shown (R. 3758). By denying the benefit of the rule here the District Court permitted the Government to withhold records and then submitted to the jury the issue of the inadequacy of the partial records in evidence. This travesty of justice was sanctioned by the Court of Appeals and its action violates the spirit of the rule as interpreted in the *Bowman* case, supra.

Petitioner also sought a subpoena for production of the records, which was quashed. The grounds for quashing subpoenas as set forth in Rule 17 are that compliance would be (a) unreasonable or (b) oppressive. There was no suggestion that the Government would have been hampered in any way and the Court of Appeals stated no grounds which are recognized by Rule 17.

Although evidencing some uncertainty as to the proper interpretation of the *Bowman* case, the Court of Appeals for the District of Columbia has followed the "view which leads to the fullest presentation of facts." *Frank Fryer* v. *United States*, No. 11564, July 17, 1953. The *Fryer* case held that since the rule provides for modification of subpoenas to exclude unreasonable and oppressive demands, the Trial Court should not quash a subpoena in the absence of sound reasons for precluding pre-trial inspection. Tested by that interpretation, the court below has misconceived

[5] This is the interpretation of the Government and the court below. As pointed out supra pp. 21-23 their interpretation is probably incorrect.

the purpose of the rule and has adopted, instead, an interpretation which is harsh and unduly restrictive.

The ruling of the court below cannot be reconciled with the decision in *Gordon* v. *United States,* 344 U.S. 414, where, in passing on the request of a defendant in a criminal case for the production of evidence tending to impeach a Government witness, this Court held, even in the absence of specific legislation, that (p. 420) "For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule * * * ".

There is a divergence of opinion among the courts with respect to the teaching of the *Bowman* case and the superficial distinction made by the court below (R. 3757-8) seems to be out of harmony with the well-considered opinion in the *Fryer* case.

6. Presumption of Prejudice Where Outside Contact with the Jury Has Occurred.

An important question is presented involving serious aspects of federal criminal justice. The Court of Appeals approved the summary denial of petitioner's motion for a new trial and his request that the District Court hold a hearing on a reported instance of improper contact with the jury. The Court of Appeals held that petitioner had failed to show any prejudice (R. 3776-7). The record contained only petitioner's affidavit calling to the attention of the District Court the stories which had appeared in two newspapers (R. 111-120). In substance these articles reported that the foreman of the jury had received a suggestion that money might be paid him to influence the verdict, that the trial judge had caused an investigation to be made and had concluded that the incident was harmless. Petitioner's affidavit was filed promptly upon learning of the incident after the jury had returned its verdict. Petitioner's motion for a hearing to determine precisely what had occurred was denied (R. 93-94).

The record contains no official statement concerning the incident. The District Judge did not even comment on the

petitioner's motion (R. 93-94). The Court of Appeals relied solely on the newspaper stories to answer petitioner's assignments of error and to determine whether petitioner had been prejudiced (R. 36-37). The Court of Appeals held that petitioner had the burden of showing prejudice before he could get a hearing. We submit that the court should have at least remanded the case for the purpose of holding a hearing for the record, and that the District Court should have been required to pass on the motion for new trial in the light of the evidence developed at the hearing. Only by such orderly procedure could a satisfactory record be made. We submit further that petitioner has been convicted by a jury which was evidently subjected to outside influence of a character calculated to affect its deliberations, and that the assertions of prejudice to the petitioner set forth in the affidavit (R. 112) were well taken.

Whether investigation was actually made by the Federal Bureau of Investigation; whether its purpose was to ascertain the affect on the jury; whether one or more jurors were subjected to interrogation by the agents of the Federal Bureau of Investigation; whether the jurors were asked polite questions or were subjected to a grilling; whether any of the jurors was apprehensive of being suspected and criticized should he vote for a verdict favorable to the petitioner; the identity of the third party who supposedly communicated with the juror; the full conversation between them; what took place at the supposed conference between the juror and the trial judge; what took place between the trial judge, the juror, and the prosecuting attorney; what took place between the agents of the Federal Bureau of Investigation and the prosecuting attorneys; what the juror supposed to have been contacted communicated to his fellow jurors—none of this information is contained in the record, and petitioner was denied an opportunity to ascertain it.

Whether the newspaper stories were complete or accurate was unknown to the Court of Appeals and its casual disposition of the matter is in sharp contrast to the serious view of such incidents customarily taken by the Courts.

On this barren record, the question is whether a District Judge is authorized to make an off-the-record examination of such an occurrence and leave no basis for an appellate court to form a judgment of the propriety of his action. In *Ryan* v. *United States*, 191 Fed. 2d. 799 (C.A. D.C.) the record showed that several jurors and other witnesses were examined and cross-examined. The Court of Appeals approved this procedure and said, p. 781, "the trial court adopted the appropriate procedure of probing the matter by an extensive hearing." Here there is no such record and the District Court declined to hold a reported hearing.

As stated, the denial of petitioner's motion for hearing was approved by the Court of Appeals on the ground that petitioner had failed to show any prejudice. When the District Court learned of the incident, he recognized that he had a duty to cause an examination to be made; he did not wait for anybody to show prejudice. Outside contacts with a jury raise a presumption of prejudice, *Mattox* v. *United States*, 146 U. S. 140, 150, and the cases hold that the presumption can be overcome only by affirmatively showing that there was no prejudice. *Stone* v. *United States*, 113 Fed. 2d. 70, 77-78 (CA 6); *Little* v. *United States*, 73 Fed. 2d. 861 (CA 10); *Wheaton* v. *United States*, 133 Fed. 2d. 522 (CA 8).

If the newspaper articles are reliable (and that is the evidence upon which the Court of Appeals held there was no prejudice) the district judge already knew that a juror had been contacted, and the court had concluded for itself that the contact was harmless. Alternate jurors were available, but the contacted juror was not withdrawn. The defense had been excluded from the investigation and was entitled to have the aid of the court in adducing the facts

for the record. Under the circumstances the Court of Appeals' reliance on the lack of affidavits from jurors was an insufficient basis for approving the action of the District Court, and transferred to the defense a burden which it is not required to bear.

The action of the Court of Appeals ignores the presumption of prejudice which arises upon a mere showing of outside influence on the jury, and leaves to a single district judge the authority to exclude the defense from any part in the investigation and personally make a final decision which reflects only his own judgment, with no opportunity for either the defense or a reviewing court independently to appraise the situation. This Court should determine whether such a procedure is calculated to safeguard the integrity of the jury system and to preserve the constitutional right to a fair and impartial trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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